A

SCOTT & ENGLISH (M) SDN BHD v. YUNG CHEN WOOD INDUSTRIES SDN BHD

FEDERAL COURT, KOTA KINABALU
ZULKEFLI AHMAD MAKINUDIN PCA
HASAN LAH FCJ
B AZIAH ALI FCJ
PRASAD SANDOSHAM ABRAHAM FCJ
JEFFREY TAN FCJ
[CIVIL APPEAL NO: 02(f)-108-12-2016(S)]
12 APRIL 2018

C

CIVIL PROCEDURE: *Functus officio – Judgments and orders – Finality – Re-litigation of orders of High Court – Whether order of High Court sealed – Whether High Court functus officio – Whether trial court could amend its order after order affirmed or reversed by higher court – Whether there were accidental slip*
D *or omission that warranted corrections*

The respondent ('the plaintiff') sued the appellant ('the defendant') at the High Court for breach of contract and warranties arising from the sale of two generator sets by the latter to the former. The plaintiff prayed for orders that the defendant (i) repay to the plaintiff a sum of RM264,000 and damages for
E diesel oil consumption; (ii) further or in the alternative, replace the two generators with two new ones and install the same at the defendant's own costs ('prayer (ii)'); (iii) or alternatively, the defendant supply, install and set up, in running condition at the plaintiff's factory, another new generator at the defendant's own costs ('prayer (iii)'); and (iv) damages and incidental
F costs. The trial judge allowed the plaintiff's claim for damages but held that it was not entitled to the relief sought. Before the Deputy Registrar ('the DR') could assess damages, the plaintiff applied to the trial judge to clarify that the plaintiff had not abandoned prayers (ii) and (iii). The trial judge ordered that judgment be entered against the defendant and damages be assessed by the
G DR to reflect prayers (ii) and (iii). The defendant was unsuccessful in its appeals to the Court of Appeal and Federal Court. The plaintiff moved the DR to assess damages. The DR awarded RM3,382,222.09 ('the award') to the plaintiff ('the DR's order'). The defendant appealed against the DR's order to the judge-in-chambers ('the JIC'). The JIC set aside the award and
H awarded RM264,000 to the plaintiff ('the JIC's order'), which was subsequently paid by the defendant to the plaintiff. The plaintiff's appeals against the JIC's order to the Court of Appeal and the Federal Court proved futile. The plaintiff reverted to the High Court and applied to seal the draft order to reflect the actual orders made by the trial judge. The High Court Judge ('the HCJ') held that (i) the judgment of the trial judge did not indicate
I that prayer (i) of the draft order was ever granted; and (ii) given that the plaintiff had not appealed against the order of the trial judge and that the order was sealed and acted upon by the DR and the JIC, whose decision was

affirmed by the Court of Appeal and the Federal Court, the court was *functus officio*. The plaintiff appealed to the Court of Appeal. In allowing the appeal and amending the order as per the draft order, the Court of Appeal held that (i) the HCJ overlooked the judgment of the trial judge; and (ii) prayers (ii) and (iii) were never abandoned and that the draft order reflected the decision of the trial judge after the clarification exercise. Hence, the present appeal.

Held (allowing appeal)
Per Jeffrey Tan FCJ delivering the judgment of the court:

(1) All litigation must come to an end. The plaintiff could not re-litigate the orders of the trial judge and the JIC. When the order of the trial judge was sealed, the High Court became *functus officio*, save and except to correct 'clerical mistakes in the judgment or orders, or errors arising therein from any accidental slip or omission', as stipulated under O. 20 r. 11 of the Rules of Court 2012. The draft order which proposed wholesale changes to the order of the trial judge was clearly and visibly not within the ambit of 'clerical mistakes or errors arising therein from any accidental slip or omission'. (paras 21-22)

(2) None of the authorities relied by the Court of Appeal supported the proposition that the sealed order of the trial judge could be amended as per the draft order. There could not be an authority to the effect that a trial court could amend its order after that order has been affirmed or reversed by a higher court. There would be a total mayhem in the judicial system if a lower court could amend an order affirmed by a higher court. The position is that unless appealed against, an order of a trial court stands final, binding and conclusive as pronounced by the trial court. If appealed against, an order of the trial court stands final, binding and conclusive as pronounced by the higher or highest court. (para 23)

(3) The defendant's application for leave to appeal, in effect, against the order of the trial judge, was dismissed by the Federal Court. With leave refused, the order of the trial judge was final, binding and conclusive as affirmed by the Federal Court. The HCJ was absolutely right to refuse the plaintiff's application to amend the order of the trial judge. The Court of Appeal acted out of jurisdiction when it allowed the order of the trial judge, as affirmed by the Federal Court, to be re-opened. (para 24)

***Bahasa Malaysia** Headnotes*

Responden ('plaintif') mengambil tindakan undang-undang terhadap perayu ('defendan') di Mahkamah Tinggi bagi pelanggaran kontrak dan waranti susulan jualan dua set jentera oleh defendan kepada plaintif. Plaintif memohon perintah-perintah agar defendan (i) membayar semula kepada plaintif sejumlah RM264,000 dan ganti rugi penggunaan minyak diesel;

(ii) selanjutnya atau sebagai alternatif, mengganti dua jentera dengan dua yang baharu dan memasangnya dengan kos defendan sendiri ('permohonan (ii)'); (iii) atau secara alternatifnya, defendan membekalkan, memasang dan membina, dalam keadaan tersedia berjalan di kilang plaintif, satu jentera baharu dengan kos defendan sendiri ('permohonan (iii)'); dan (iv) ganti rugi dan kos sampingan. Hakim bicara membenarkan tuntutan plaintif bagi ganti rugi tetapi memutuskan plaintif tidak berhak mendapat relief yang dipohon. Sebelum Penolong Pendaftar ('PP') mentaksir ganti rugi, plaintif memohon pada hakim bicara untuk menjelaskan bahawa plaintif tidak mengabaikan permohonan (ii) dan (iii). Hakim bicara memerintahkan penghakiman direkodkan terhadap defendan dan ganti rugi ditaksir oleh PP agar mencerminkan permohonan (ii) dan (iii). Defendan gagal dalam rayuannya ke Mahkamah Rayuan dan Mahkamah Persekutuan. Plaintif memohon agar PP mentaksir ganti rugi. Penolong Pendaftar mengawardkan RM3,382,222.09 ('award') kepada plaintif ('perintah PP'). Defendan merayu terhadap perintah PP pada hakim-dalam-kamar ('HDK'). Award diketepikan dan HDK mengawardkan RM264,000 kepada plaintif ('perintah HDK'), yang seterusnya dibayar oleh defendan kepada plaintif. Rayuan plaintif terhadap perintah HDK di Mahkamah Rayuan dan Mahkamah Persekutuan tidak berjaya. Plaintif ke Mahkamah Tinggi semula dan memohon untuk memeterai deraf perintah agar mencerminkan perintah-perintah sebenar yang dikeluarkan oleh hakim bicara. Hakim Mahkamah Tinggi ('HMT') memutuskan (i) perintah hakim bicara tidak menyatakan permohonan (i) deraf perintah dibenarkan; dan (ii) memandangkan plaintif tidak merayu terhadap keputusan hakim bicara dan bahawa perintah dimeterai dan DR dan JC telah bertindak berdasarkannya dan keputusan ini disahkan oleh Mahkamah Rayuan dan Mahkamah Persekutuan, mahkamah telah *functus officio*. Plaintif merayu di Mahkamah Rayuan. Membenarkan rayuan dan meminda perintah tersebut seperti deraf perintah, Mahkamah Rayuan memutuskan (i) HMT terlepas pandang penghakiman hakim bicara; dan (ii) permohonan (ii) dan (iii) tidak pernah diabaikan dan deraf perintah mencerminkan keputusan hakim bicara selepas langkah penjelasan. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan)
Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:

(1) Semua litigasi mestilah berakhir. Plaintif tidak boleh melitigasi semula perintah-perintah hakim bicara dan HDK. Apabila perintah hakim bicara dimeterai, Mahkamah Tinggi telah *functus officio*, kecuali dan melainkan untuk membetulkan 'kesilapan perkeranian dalam penghakiman atau perintah, atau ralat yang berbangkit di dalamnya daripada apa-apa keciciran atau peninggalan tidak sengaja', seperti yang diperuntukkan bawah A. 20 k. 11 Kaedah-Kaedah Mahkamah 2012. Deraf perintah yang mencadangkan pertukaran yang banyak pada perintah hakim bicara jelas tidak terangkum bawah 'kesilapan

perkeranian dalam penghakiman atau perintah, atau ralat yang berbangkit di dalamnya daripada apa-apa keciciran atau peninggalan tidak sengaja'.

(2) Tidak satu pun nas yang dijadikan sandaran oleh Mahkamah Rayuan yang menyokong cadangan bahawa perintah bermeterai hakim bicara boleh dipinda seperti deraf perintah. Tidak mungkin wujud nas yang memberi kesan agar mahkamah bicara boleh meminda perintahnya selepas perintah tersebut telah disahkan atau diakas oleh mahkamah yang lebih tinggi. Pasti berlaku kacau bilau dalam sistem kehakiman jika mahkamah bawahan boleh meminda perintah yang disahkan oleh mahkamah atasan. Kedudukan sedia ada adalah kecuali dirayu, satu perintah mahkamah bicara kekal kukuh, muktamad dan mengikat seperti yang diisytiharkan oleh mahkamah bicara. Jika dirayu, satu perintah mahkamah bicara kekal kukuh, muktamad dan mengikat seperti yang diisytiharkan oleh mahkamah yang lebih tinggi atau tertinggi.

(3) Permohonan defendan untuk kebenaran merayu, secara kesannya, terhadap perintah hakim bicara, ditolak oleh Mahkamah Persekutuan. Apabila kebenaran ditolak, perintah hakim bicara kukuh, muktamad dan mengikat seperti yang disahkan oleh Mahkamah Persekutuan. Hakim Mahkamah Tinggi bertindak betul dalam menolak permohonan plaintif untuk meminda perintah hakim bicara. Mahkamah Rayuan bertindak melampaui bidang kuasanya apabila membenarkan perintah hakim bicara, seperti yang disahkan oleh Mahkamah Persekutuan, agar dibuka semula.

Case(s) referred to:

Armitage v. Parsons [1908] 2 KB 410 ***(refd)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***
Henderson v. Henderson (1843) 3 Hare 100 ***(refd)***
Henry William Hatton v. Hugh Harris [1892] AC 547 ***(refd)***
Hession v. Jones [1914] 2 KB 421 ***(refd)***
Hip Foong Hong v. Neotia & Co [1918] AC 888 ***(refd)***
Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***
Jonesco v. Beard [1930] AC 298 ***(refd)***
Kelsey v. Doune [1912] 2 KB 482 ***(refd)***
Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd [2011] 5 CLJ 866 CA ***(refd)***
Malaysia Borneo Finance Corp (M) Bhd v. Malayan Produce Co Sdn Bhd & Anor [2000] 6 CLJ 347 HC ***(refd)***
Ooi Bee Tat v. Ooi Bee Tat & Sons Sdn Bhd & Anor [1998] 1 LNS 358 HC ***(refd)***
Pearlman (Veneers) SA Pty Ld v. Bernhard Bartels [1954] 1 WLR 1457 ***(refd)***
Re Gist [1904] 1 Ch 398 ***(refd)***
Re St Nazaire Co (1879) 12 Ch D 88 ***(refd)***
Smith v. Peizer 65 SJ 607 ***(refd)***
Syarikat Marak Jaya Sdn Bhd v. Syarikat Masinda Sdn Bhd [1991] 1 CLJ 809; [1991] 4 CLJ (Rep) 22 HC ***(refd)***
Thynne (Marchioness of Bath) v. Thynne (Marquess of Bath) [1955] P 272 ***(refd)***

A *Tiew Kun v. Tneu Seng Bee & Another Appeal [2010] 2 CLJ 68 CA* ***(refd)***
Yung Chen Wood Industries Sdn Bhd v. Scott & English (M) Sdn Bhd [2016] 5 CLJ 291 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74
B Rules of Court 2012, O. 20 r. 11, O. 42 r. 13
Rules of the High Court 1980, O. 20 r. 11
Rules of the Supreme Court 1957, O. 28 r. 11

Rules of the Supreme Court (Ireland) 1891, O. XXVIII r. 11

For the appellant - Norbert Yapp & Eow Ee Pei; M/s Norbert Yapp & Assocs
C *For the respondent - Edwin Tsen; M/s Tan Pang Tsen & Co*

[Editor's note: For the Court of Appeal judgment, please see Yung Chen Wood Industries Sdn Bhd v. Scott & English (M) Sdn Bhd [2016] 5 CLJ 291 (overruled); For the High Court judgment, please see [2006] 1 LNS 261 (affirmed).]

D *Reported by Najib Tamby*

JUDGMENT

Jeffrey Tan FCJ:

E **[1]** On 10 October 2017, we heard and unanimously allowed this appeal. We set aside the order of the Court of Appeal dated 19 May 2014 and restored the order of Douglas Cristo Primus Sikayun JC, as he then was, dated 18 September 2013. We now give our reasons for our decision.

[2] Yung Chen Wood Industries Sdn Bhd (hereinafter referred to as the F plaintiff) sued Scott & English (M) Sdn Bhd (hereinafter referred to as the defendant) for breach of contract and conditions and warranties arising from the sale of two generator sets by the defendant to the plaintiff, and prayed, in its amended statement of claim, for the following reliefs:

(i) an order that the defendant repay to the plaintiff a sum of (RM264,000) G and damages for diesel oil consumption for having to operate other generators sets to make up the power deficit of the generators sets for the duration of the life span of the two generators sets;

(ii) further or in the alternative, for an order that the defendant do within one month from the date of judgment, replace the two generators sets H with two brand new generator sets of similar make and specifications capable of actually performing up to a power rating of 1000 KW each and install and set up in running conditions the same at the plaintiff's factory at Seguntor, at the defendant's own costs inclusive of all incidental costs;

I (iii) or alternatively, for an order that the defendant do within one month from the date of judgment, supply install and set up in running condition at the plaintiff's factory at Seguntor another brand new generator set of

similar make and specifications capable of actually producing at least 1000 KW to make up the power deficit of the two generator sets, at the defendant's own costs inclusive of all incidental costs;

(iv) damages and incidental costs involved in having to set up the new wiring, power lines connections, equipment installation, control panel network, etc in respect of additional generator sets to make up the power deficit of the two generators sets, to be assessed.

[3] At the conclusion of the trial, Linton Albert J, as he then was, held that "the plaintiff has, on a balance of probabilities established that the defendant was in breach of its promise that the two units of generators would produce a total of 2000 kilowatts and therefore liable to the damages occasioned by the breach". Linton Albert J however held that the plaintiff was not entitled to the reliefs sought, save for damages.

> [9] Finally, I do not think that the plaintiff is entitled to the reliefs sought in the statement of claim other than damages because they have been abandoned in learned counsel's opening statement where it was stated thus:
>
> 'The plaintiff will be dealing with the issue of liability only at this trial and damages to be assessed upon finding of issue of liability against the defendant.'
>
> [10] For the reasons and in the circumstances aforesaid, judgment is entered for the plaintiff with damages to be assessed by the deputy registrar and costs to be taxed unless agreed. Order accordingly."
>
> (for the judgment of Linton Albert J, see *Yung Chen Wood Industry Sdn Bhd v. Scott & English (M) Sdn Bhd* [2006] 7 MLJ 57)

[4] But before the learned Deputy Registrar (DR) could assess damages, the plaintiff successively applied to Linton Albert J to clarify that "the plaintiff had not abandoned prayers (ii) and (iii)". The sealed order (encl. 99 in the High Court) consequently read:

> It is this day ordered that judgment be entered against the Defendant and damages be assessed by the Deputy Registrar to reflect Prayers (ii) and (iii) of the Writ of Summons and costs to the Plaintiff to be taxed unless agreed.

[5] The defendant appealed (S-02-800-2006) to the Court of Appeal. The Court of Appeal dismissed the appeal. The Federal Court also dismissed the defendant's application (08(f)-102-2009) for leave to appeal. Thereafter, the plaintiff moved the learned DR to assess damages. In his opening address to the learned DR, learned counsel for the plaintiff informed that the order stated that damages should reflect prayers (ii) and (iii). On 22 January 2009, the learned DR awarded RM3,382,222.09 together with interest at the rate 8% per annum to the plaintiff.

[6] Against that order of the learned DR, the defendant appealed to the judge-in-chambers. On 10 December 2009, Yew Jen Kie JC, as she then was, set aside the award of RM3,382,222.09 and awarded RM264,000 to the plaintiff. The defendant paid that RM264,000 to the plaintiff.

[7] On 31 December 2009, against that order dated 10 December 2009, the plaintiff appealed (S-03(IM)-52-2010) to the Court of Appeal. On 12 December 2012, the Court of Appeal dismissed the plaintiff's appeal and affirmed the decision of Yew Jen Kie JC. On 26 March 2013, the Federal Court dismissed the plaintiff's application (08(f)-26-01-2013) for leave to appeal against the order of the Court of Appeal dated 12 December 2012.

[8] Where all else had failed, the plaintiff reverted to the High Court and applied "to seal the draft order to reflect the actual orders made by the trial judge (Linton Albert J, as he then was) under judgment dated 6 July 2006". Douglas Cristo Primus Sikayun JC, who heard that application, related in his judgment dated 18 September 2013 that the draft order (draft order) read:

(i) that the defendant repay the plaintiff a sum of RM264,000 and damages for diesel oil consumption for having to operate other generator sets to make up the power deficit of the two said generator sets for the duration of the life span of the two said generator sets;

(ii) that the defendant do within one month from the date of judgment supply install and set up in running condition at the plaintiffs' factory at Seguntor another brand new generator set of similar make and specifications capable of actually producing at least 1000 KW to make up the power deficit of the two said generator sets at the defendants own costs inclusive of all incidental costs.

[9] Douglas Cristo Primus Sikayun JC held that the judgment of Linton Albert J did not indicate that prayer (i) of the draft order or prayer (i) of the amended statement of claim was ever granted:

> From my reading of the written judgment of the trial judge [Linton Albert J] there is nothing in the judgment to indicate that prayer (i) of the Plaintiff's amended statement of claim has been granted by the trial judge. In fact, after the clarification sought before the trial judge on 10.8.2006, the trial judge only recorded in the notes of proceeding that 'the damages to be assessed would hereby be ordered to reflect the act that prayers 2 and 3 were not abandoned'.
>
> It is pertinent to note that during the hearing of the appeal to the judge-in-chambers ... the Plaintiff already raised the issue about the terms of the judgment. On this issue, the learned JC [Yew Jen Kie JC] had noted as follows:
>
> > Based on the notes of proceedings recorded on 11.8.2006, only Mr Edwin Tsen for the plaintiff appeared, defendant was absent. Learned trial judge said thus: the damages to be assessed would hereby be ordered to reflect the fact that the prayers 2 and 3 were not abandoned.

The learned JC further noted:

> To my mind if the judge is minded to grant prayer (i) he would have expressly stated that the judgment in terms of prayer (i). By not stating so, the judgment is only for damages to be assessed and after the clarification, that damages to be assessed is to reflect that prayers 2 and 3 are not abandoned.

[10] Douglas Cristo Primus Sikayun JC furthermore held (i) that given that the plaintiff had not appeal against the order of Linton Albert J and that the order dated 6 July 2006 was sealed and acted upon by the learned DR and Yew Jen Kie JC, whose decision was affirmed by the Court of Appeal and the Federal Court, the court was *functus officio*; (ii) that pursuant to O. 42 r. 13 of the Rules of Court 2012, an application to vary an order or judgment must be made within 30 days of receipt of the order or judgment; (iii) that the instant application to amend the order dated 6 July 2006, which was made seven years after entry of the judgment, if granted, would prejudice the defendant, and (iv) that since the order of Yew Jen Kie JC had been affirmed by the Court of Appeal and the Federal Court, it was too late to apply "to extract the (draft order) under the guise of clarification".

[11] Against the judgment of Douglas Cristo Primus Sikayun JC dated 18 September 2013, the plaintiff appealed to the Court of Appeal. In its judgment (see *Yung Chen Wood Industries Sdn Bhd v. Scott & English (M) Sdn Bhd* [2016] 5 CLJ 291; [2016] 12 MLJ 180), the Court of Appeal remarked that Douglas Cristo Primus Sikayun JC overlooked that Linton Albert J had prepared the following short judgment after his clarification of his order dated 6 July 2006:

> [21] It is pertinent to note that the learned judge did prepare a short judgment after the clarification of the order. We produced below the short judgment:
>
> > Is the Plaintiff entitled to the reliefs sought in the Statement of Claim together with general damages to be assessed as submitted in the Plaintiff's opening statement.
> >
> > Insofar as prayers (ii) and (iii) are concerned, I am of the view that it would be fair for the Defendant to replace an additional general set to make up the deficit of the two old generator sets instead of replacement of two new generator sets taking into account that the two said generator sets had been used for quite some time.
> >
> > For the reasons aforesaid, I Order that the Defendant do within one (1) month from the date of this Judgment, supply install and set-up in running condition at the plaintiff's factory another new generator set of producing at least 100KW (?) to make up the deficit of the 2 said generator sets at the Defendant's costs and damages to be assessed by the Deputy Registrar and costs to be taxed unless agreed.
> >
> > Order accordingly.
> >
> > Signed. YA Tuan Linton Albert, J.

[12] At [24] and [25] of its judgment, the Court of Appeal held that prayers (ii) and (iii) of the amended statement of claim were never abandoned, and that the draft order reflected the decision of Linton Albert J after the clarification exercise. And at [28] of its judgment, the Court of Appeal agreed with the plaintiff's submission that the assessment so far undertaken by the learned DR was "about damages suffered by the plaintiff on extra fuel cost resulting from the two defective generator sets which were supplied by the defendant ... the damages on the cost of replacing and installing a new generator set of 1000kw as ordered by the learned trial judge Linton Albert J had not been considered or assessed:

> [28] We agree with this submission by learned counsel for the plaintiff. We have carefully scrutinised the ruling by the deputy registrar on the assessment of damages delivered on 8 January 2008. We are satisfied that in the assessment of damages the deputy registrar was dealing mainly with the plaintiff's claim for the cost of extra diesel used (see pp 32-34 and p 38 of the supplementary appeal record). Likewise when the said ruling on the award by the deputy registrar was appealed to judge in chambers, the learned judicial commissioner then was only concerned with evidence by the plaintiff to prove the extra fuel cost and set aside the award of RM3,382,222.09 awarded by the deputy registrar - (see pp 121–124 appeal record).

[13] The Court of Appeal held the firm view that Linton Albert J had granted prayers (ii) and (iii) of the amended statement of claim, and that the learned DR and Yew Jen Kie JC had not considered prayers (ii) and (iii):

> [29] Going back to the first sealed order of the judgment by the trial judge after the clarification, it is without doubt that reading the order, the trial judge's intention was to grant the plaintiff's prayers (ii) and (iii) of its statement of claim. The effect therefore is that the defendant is required to replace two defective generator sets with two brand new ones. It follows that if the defendant is unable to do so then the assessment of damages must reflect the cost suffered by the plaintiff in replacing and installing the new set of generators on their own. But this alternative prayer was never considered by the learned deputy registrar in her assessment of damages or for that matter, by the learned judicial commissioner who heard the appeal in chambers.

[14] Finally, on the power of the court to amend the order dated 6 July 2006, the Court of Appeal held that the case of *Syarikat Marak Jaya Sdn Bhd v. Syarikat Masinda Sdn Bhd* [1991] 1 CLJ 809; [1991] 4 CLJ (Rep) 22; [1991] 2 MLJ 417 supported the proposition that the court has the discretion to amend any orders at any time to reflect what had been ordered in fact, that it is established principle that the court has inherent power to vary its own orders so as to carry out its own meaning and to make its meaning plain (the Court of Appeal cited *Thynne (Marchioness of Bath) v. Thynne (Marquess of Bath)* [1955] P 272 (CA), *Pearlman (Veneers) SA Pty Ld v. Bernhard Bartels* [1954] 1 WLR 1457 and referred to the Supreme Court Practice 1993 Vol

1 Part 1 London Sweet & Maxwell), and that in *Henry William Hatton v. Hugh Harris* [1892] AC 547, Lord Watson said: "Where an error of that kind has been committed it is always within the competency of the court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring in harmony with the order which the judge obviously meant to pronounce".

[15] For those reasons, the Court of Appeal allowed the plaintiff's appeal and amended the order dated 6 July 2006, as per the draft order.

[16] Against the decision of the Court of Appeal, the defendant obtained leave to appeal to the Federal Court on the following "questions of law":

(a) Whether the time stipulated in O. 42 r. 13 of the Rules of Court 2012 for amending or varying a judgment or order is a mandatory provision?

(b) Whether a judgment creditor is estopped from amending or varying a judgment after it had executed on the original judgment or order?

[17] As said, we allowed the appeal and set aside the order of the Court of Appeal. But before we touch on the primary reason for our reversal of the decision of the Court of Appeal, we see it fit to make the following observations that pertained to the Court of Appeal's findings of fact (i) that the assessment so far undertaken by the learned DR was "about damages suffered by the plaintiff on extra fuel cost resulting from the two defective generator sets which were supplied by the defendant", and (ii) that prayers (ii) and (iii) had not been considered by the learned DR or by Yew Jen Kie JC.

[18] The Court of Appeal held that the assessment so far undertaken by the learned DR and Yew Jen Kie JC had to do only with the extra fuel cost. But with respect, the Court of Appeal should have said that the learned DR and Yew Jen Kie JC only assessed the extra fuel cost. That was so because the plaintiff only claimed the extra fuel cost. In his opening address, learned counsel for the plaintiff reminded the learned DR that "the judgment ordered that damages should reflect prayers (ii) and (iii)" (see p. 107 of the appeal record) and then invited the learned DR "to make the appropriate orders, apart from the damages suffered for the increase in the consumption of diesel due to under performance of the two generators supplied to the plaintiff". In any case, that Linton Albert J had granted prayers (ii) and (iii) did not escape the learned DR. In his grounds of decision, the learned DR carefully recited "on 6 July 2006, Linton Albert J ... granted judgment [to] the plaintiff with damages to be assessed to reflect prayers (ii) and (iii) ... " (see 178AR). Thereafter, his short survey of the law relating to s. 74 of the Contracts Act 1950, the learned DR narrated that "the plaintiff urged the court to award damages to the plaintiff on the basis that the plaintiff incurred loss by having to pay more for diesel due to the under performance of the two generators supplied by the defendant to the plaintiff" (see 181AR) and that the plaintiff "prayed for an award of RM3,382,222.09" to account for the extra fuel cost

(see 181AR – 183AR). It could not be denied that Linton Albert J ordered "judgment be entered against the defendant and damages be assessed by the Deputy Registrar to reflect prayers (ii) and (iii) ... ". But when damages were assessed, the plaintiff only claimed and quantified the extra fuel cost. To all intents and purposes, the plaintiif no longer pursued prayers (ii) and (iii). Thus, there was no reason for the learned DR to assess damages as ordered. But if the learned DR were wrong in his assessment, the plaintiff should appeal against his order. But given that it had not appealed against, the plaintiff could not be heard to complain that prayers (ii) and (iii) were not considered.

[19] Only the defendant appealed to the judge-in-chambers against the order of the learned DR. At the appeal before the judge-in-chambers, prayers (ii) and (iii) were not raised by the plaintiff in its written submission (see 123AR). Yew Jen Kie JC ruled that the learned DR did not exceed his jurisdiction in awarding damages of RM3,382,222.09 to the plaintiff, but held that the plaintiff had not proved the extra fuel cost. However, Yew Jen Kie JC ordered the defendant, who had offered "to compensate RM264,000 to restore the plaintiff to its original position as if the contract had been perfectly performed", to pay RM264,000 to the plaintiff.

[20] As said, against the order of Yew Jen Kie JC, the plaintiff appealed to the Court of Appeal. When its appeal (S-02-800-2006) was dismissed by the Court of Appeal, the plaintiff applied to the Federal Court for leave to appeal. But when the Federal Court refused leave to appeal, all litigation that pertained to the order of Yew Jen Kie JC had run its entire course (see *Ooi Bee Tat v. Ooi Bee Tat & Sons Sdn Bhd & Anor* [1998] 1 LNS 358; [1999] 5 MLJ 10). There was no appeal beyond the Federal Court. The plaintiff had exhausted all possible appeals. The order of Yew Jen Kie JC became final and conclusive (see *Tiew Kun v. Tneu Seng Bee & Another Appeal* [2010] 2 CLJ 68; [2010] 2 MLJ 213). By the same token, when the Federal Court refused leave to the defendant to appeal, the order of Linton Albert J became final and conclusive. Both the orders of Linton Albert J and Yew Jen Kie JC were amenable to the doctrine of *res judicata*. "Literally translated, *res judicata* is 'the fact has been decided'. It expresses a general public interest policy that the same issue (or cause of action) should not be litigated more than once even if the parties are different. It prevents vexatious litigation and any abuse of the courts' process on the premise that final judgments are binding and conclusive (see *Henderson v. Henderson* (1843) 3 Hare 100)" (*Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd* [2011] 5 CLJ 866; [2011] 6 MLJ 788, per Abdul Hamid Embong JCA, as he then was, delivering the judgment of the court). Since finally adjudged, the orders of Linton Albert J and Yew Jen Kie JC became the truth between the plaintiff and defendant (see *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189).

[21] All litigation must come to an end. The plaintiff could not relitigate the orders of Linton Albert J and Yew Jen Kie JC. We agree with Douglas Cristo Primus Sikayun JC that when the order of Linton Albert J was sealed, the High Court became *functus officio*, save and except to correct "clerical mistakes in the judgment or orders, or errors arising therein from any accidental slip or omission" (see O. 20 r. 11 of the Rules of Court 2012). Order 20 r. 11 "is not at all encompassing and it is restricted to certain cases where there has been a clerical mistake or error arising from accidental slips or omissions by court officers (*Re Gist* [1904] 1 Ch 398) and the parties themselves (*Armitage v. Parsons* [1908] 2 KB 410)" (*Malaysia Borneo Finance Corp (M) Bhd v. Malayan Produce Co Sdn Bhd & Anor* [2000] 6 CLJ 347; [2000] 5 MLJ 352 per Abdul Malik Ishak J, as he then was). "Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in O. 28 r. 11 Rules of the Supreme Court 1957 (O. 20 r. 11 of the Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: *Re St Nazaire Co* (1879) 12 Ch D 88, *Kelsey v. Doune* [1912] 2 KB 482; *Hession v. Jones* [1914] 2 KB 421, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v. Neotia & Co* [1918] AC 888 and *Jonesco v. Beard* [1930] AC 298. The hearing of the action will in a proper case be expedited: *Smith v. Peizer* 65 SJ 607" (*Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143 per Chang Min Tat FJ, delivering the judgment of the court).

[22] The draft order which proposed wholesale changes to the order of Linton Albert J was clearly and visibly not within the ambit of "clerical mistakes or errors arising therein from any accidental slip or omission". Even so, the Court of Appeal held that *Syarikat Marak Jaya Sdn Bhd v. Syarikat Masinda Sdn Bhd*, *Thynne v. Thynne*, *Pearlman (Veneers) SA Pty Ld v. Bernhard Bartels*, and *Henry William Hatton v. Hugh Harris* supported the proposition that the order of Linton Albert J could be amended as per the draft order. Unfortunately, the Court of Appeal failed to appreciate that the amendments sought and granted in those cases were mere corrections which did not affect the substantive judgment or order, and that the power to amend a sealed order is very limited.

(a) In *Thynne v. Thynne*, the parties, who secretly married on 8 October 1926 at St Paul's Church, Knightsbridge, went through a second ceremony of marriage on 27 October 1927 at St Martin-in-the-Fields. In her petition for divorce, the petitioner averred that she was married to the respondent on 27 October 1927. A decree *nisi* was pronounced and made absolute. Subsequently, the petitioner sought leave to amend her petition and decrees *nisi* and absolute, to reflect that she had been lawfully married to the respondent on 8 October 1926 at St Paul's

Church, Knightsbridge. She sought to substitute in the petition and decrees the date and place of the marriage of 8 October 1926, for that of the ceremony of 27 October 1927. The sought amendment was granted.

(b) In *Pearlman (Veneers) SA (Pty) Ltd v. Bartels*, the name of the defendant was, by amendment, altered to Joseph Bartels, trading as Bernhard Bartels.

(c) In *Henry William Hatton v. Hugh Harris*, "in 1842, a judgment was obtained by B against a debtor upon a bond for £1000 conditioned for payment of £500 and interest. A bill in equity having been filed by other judgment creditors a decree was made in 1853 confirming the Master's report that there was then due to B under the judgment the sum of £500 with the interest then accrued, and declaring that that sum and the sums found by the Master's report to be due to other creditors with interest "until paid" were well charged upon the debtor's lands. Part of the lands was sold in 1856 under an order of the Incumbered Estates Court (Ireland) but there were not sufficient funds to pay B. In 1891 moneys derived from the sale of lands being found in court to the credit of the cause, B's representative applied to have the principal and interest then amounting to more than £1000 paid out to him. The next incumbrancer objected that no more ought to be paid to the applicant than the penal sum of £1000." It was held, "that B's charge upon the lands ought not to have been extended beyond the penalty to the prejudice of a subsequent incumbrancer; that there was obviously in the decree of 1853 an error arising from an accidental omission, and that under O. XXVIII. r. 11 of the Rules of the Supreme Court (Ireland) 1891 the decree should on a proper application be corrected by inserting the words 'the principal sum and interest not to exceed the amount of the penalty on the bond' ".

(d) In *Syarikat Marak Jaya Sdn Bhd v. Syarikat Masinda Sdn Bhd*, the order in question was not sealed or extracted. The application was not to amend but to set aside the order in question. Peh Swee Chin J, as he then was, explained that the power to review a sealed order is narrow:

> Now, a very significant factor which was not in dispute was that the order in question had never been extracted and perfected. This factor made a great deal of difference.
>
> In my view, before an order has been perfected, the court has inherent jurisdiction to review the matter. Please see *Re Harrison's Settlement* [1955] 1 All ER 185, *Re St Nazaire Co* (1879) 12 Ch D 88, *Re Thomas* [1911] 2 Ch 389 *Chua Wah Keow v. Ng Ho Huat* [1961] MLJ 321. This power is exercisable whether it is an order made in open court or in chambers, or whether order is by consent; please see *Huddersfield Banking Co Ltd v. Henry Lister* [1895] 2 Ch D 273, or otherwise so long the order has not been perfected, ie drawn up, passed and entered. I may just as well mention that when an

> order is extracted or perfected, the court can still review the same but only with the consent of both parties, or as expressly provided by the Rules of the High Court 1980 to give a few examples, in cases of setting aside judgment in default of appearance under O. 13 r. 9; setting aside judgment in default of pleadings under O. 19 r. 9; setting aside judgment in default of appearance at the hearing under O. 14 r. 11; or under O. 20 r. 11 where the order does not correctly set out the manifest intention of the court. The examples given are only a few of the examples to be found in the Rules of the High Court 1980.

[23] None of the aforesaid authorities relied by the Court of Appeal supported the proposition that the sealed order of Linton Albert J could be amended as per the draft order. Indeed, there could not be an authority to the effect that a trial court could amend its order after that order has been affirmed or reversed by a higher court. There would be total mayhem in the judicial system if a lower court could amend an order affirmed by a higher court. The position is that unless appealed against, an order of a trial court stands final, binding and conclusive as pronounced by the trial court. If appealed against, an order of the trial court stands final, binding and conclusive as pronounced by the higher or highest court.

[24] In [2] of its judgment, the Court of Appeal noted that the defendant's application for leave to appeal, in effect, against the order of Linton Albert J was dismissed by the Federal Court on 13 May 2009. With leave refused, the order of Linton Albert J was final, binding and conclusive as affirmed by the Federal Court. Douglas Cristo Primus Sikayun JC was absolutely right to refuse the plaintiff's application to amend the order of Linton Albert J. The Court of Appeal acted out of jurisdiction when it allowed the order of Linton Albert J as affirmed by the Federal Court to be reopened. Had the order of Linton Albert J not been affirmed by the higher or highest court, we would not say that the Court of Appeal acted out of jurisdiction, that is, even if we could not agree with its decision. But the order of Linton Albert J, *albeit* granted at first instance by Linton Albert J, was no longer the order of a court lower in hierarchy to the Court of Appeal. For once affirmed by the highest court, the order of Linton Albert J demanded the respect and obedience by all parties and even all courts. The Court of Appeal had no jurisdiction to disturb the order of Linton Albert J as affirmed by the highest court. Primarily, for that reason, also to put it right, we allowed the appeal, set aside the order of the Court of Appeal dated 19 May 2014 and restored the order of Douglas Cristo Primus Sikayun JC dated 18 September 2013.

[25] When we pronounced our decision, we declined to answer the leave questions, for they failed, as submissions from both counsel also failed, to capture the evident question – whether the doctrine of *stare decisis* applied. We surmised that leave must have been given to appeal to enable the correction of a blatant error.